Filed 3/29/19 P. v. Borney CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARQUES M. BORNEY, Defendant and Appellant.	B287979 Los Angeles County Super. Ct. No. SA082880

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Affirmed with directions.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Marques Borney began robbing John Woods and then beat him to death. Borney appeals his convictions for first degree

murder (Pen. Code, § 187, subd. (a); count 1) and attempted second degree robbery (Pen. Code, §§ 664, 211; count 2). He argues the court should have instructed the jury on self-defense and voluntary manslaughter and that his trial lawyer was ineffective. He requests presentence custody credits and clerical corrections in the abstract of judgment and the sentencing order. We affirm but award Borney presentence custody credits and correct errors in the abstract and the sentencing order.

I

We view evidence in favor of the prevailing party at trial. Woods and Borney were both drug dealers. Their lives intersected a final night in an apartment where Woods often stayed: Jerry Ammons's place. Woods and Ammons dined and shared a pint of gin there. About 9:30 or 10:00 p.m., Woods got ready for bed. He took off his pants and went to sleep.

Several hours later, Borney arrived. Ammons was asleep when Borney entered, but woke to glass breaking and "the racket in the living room tearing up my tables." Ammons saw Borney holding Woods down and punching him. Woods was trying to push Borney off. Borney warned Ammons to "sit your ass down before I shoot [you]." Ammons saw a gun sticking out of Borney's shirt and obeyed.

Borney ordered Woods to hand over his money. Woods said his money was in his pants, so Borney let him up. Woods had trouble on his feet because Borney had just wounded Woods's leg. Woods had more trouble finding the pants. Borney kept pressing Woods for the money. Woods was searching for the pants and Borney continued hitting him. Woods picked up a gin bottle to defend himself, swung it, lost his balance, and fell without hitting Borney. The bottle broke.

Borney got a Gray Goose vodka bottle, stood over Woods, and used it to hit Woods's head over and over.

Borney told Woods, "If you would have done what I asked you to do, I wouldn't have done that."

Borney left.

The violence had broken Ammons's three glass tables. Shattered glass was on the floor and splattered blood was throughout the carpet.

Two women named Jackson and Miles were waiting for Borney outside in the car. Borney told driver Jackson to "get your mother fucking ass on the freeway." Jackson left Miles and Borney at Miles's place, where police later found Woods's pants in a backyard trash can. Police never found Woods's wallet or money.

Borney broke Woods's skull and inflicted defensive wounds on Woods's hands. Woods died days later from head trauma.

II

Borney argues the trial court should have instructed the jury about self-defense and about how the heat of passion can reduce homicide to voluntary manslaughter.

We independently review trial court decisions about jury instructions. A trial court has no duty to instruct on a defense that lacks substantial supporting evidence. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

Borney's trial counsel rejected a manslaughter instruction but did want self-defense instructions, which the trial court considered giving. The prosecutor asked the court to examine the transcript for a factual basis. Defense counsel said Borney was cut and bleeding, suggesting a factual basis for self-defense instructions. The court said "[w]e'll discuss it some more

tomorrow" and recessed. The next day the court ruled "there's nothing in the evidence to support giving self-defense."

This ruling was correct.

On this record, Borney had no fear.

Perfect self-defense and imperfect self-defense both require fear of imminent danger to life or of great bodily injury. (*People v. Humphrey*, (1996) 13 Cal.4th 1073, 1082.) Perfect self-defense applies where the fear of imminent harm is objectively reasonable. (*Ibid.*) Imperfect self-defense is where the defendant subjectively has fear that is objectively unreasonable. (*Ibid.*)

Borney had no fear, according to the trial facts. Viewed subjectively and objectively, Borney was the large and dominating aggressor. Borney had a gun but evidently never felt a need to pull it. Woods was injured and had no gun. His lone effort to defend himself was not frightening: a swing that missed and ended in a fall. Borney watched and then moved in for the kill. No evidence suggests Borney was or should have been fearful.

Borney finished the beating and then explained it: "If you would have done what I asked you to do, I wouldn't have done that."

On appeal, Borney claims Woods could have had a gun and could have started the scuffle. Borney states that "what started the fight was anyone's guess." This is speculation.

Borney makes another argument about a cut on his face. He says he returned to the car with this cut, which suggests Woods wounded Borney, which supports his self-defense theories. This is more speculation. No evidence suggested Woods hit Borney. The evidence did suggest Borney smashed three glass tables during his attack. A gin bottle also broke. This situation

did not entitle Borney to a self-defense instruction. (See *People v. Lucky* (1988) 45 Cal.3d 259, 291.)

Similar logic applies to a heat of passion jury instruction. If evidence negates malice, this reduces an intentional killing to voluntary manslaughter. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) We presume malice is absent when someone acts in a sudden quarrel or in the heat of passion after sufficient provocation. (*Ibid.*) The victim must have provoked the defendant, either by actual or perceived conduct. (*Ibid.*) The victim's conduct must be provocative enough to cause an ordinary person to act rashly or without due reflection. (*Id.* at pp. 583–584.)

Woods's conduct was not provocative. He was slow to fetch what Borney wanted, but a reasonable person in Borney's shoes would not have responded by beating Woods to death with a vodka bottle.

The court had no duty to give these instructions.

III

Borney next argues his convictions should be reversed because his trial counsel was ineffective. This argument is incorrect.

To establish ineffectiveness, a defendant must show counsel's efforts fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In reviewing ineffective assistance claims, we defer to counsel's reasonable tactical decisions and presume counsel acted within the wide range of reasonable professional assistance. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Generally, these claims are more appropriately resolved in a habeas corpus proceeding. (*Ibid.*) According to the *Mai* test, we will reverse a

conviction on direct appeal only if (1) the record shows counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. (*Ibid.*)

The ineffectiveness, according to Borney, arose from four actions:

1. Promising testimony in opening statement from one Tina Harlston and failing to provide it;
2. Promising testimony in opening statement that Woods "exploded" on Borney and slashed Borney's face and then failing to provide this evidence;
3. Switching gears in closing argument and treating the opening statement as if counsel never made it; and
4. Failing to request self-defense and voluntary manslaughter instructions.

Borney's four arguments fails the three prongs of the *Mai* test. Borney has not asked his trial lawyer to defend these four actions, so prong two ("counsel was asked for a reason and failed to provide one") is out. Prongs one (no rational purpose) and three (no possible satisfactory explanation) lead to the same result, as follows.

Item One—Harlston. Borney's lawyer never mentioned Tina Harlston to the jury. Nor did counsel promise evidence only Harlston could have provided. One of counsel's defense theories was that Woods cut Borney's face and thus provoked Borney and forced Borney to defend himself. Counsel urged the jury to draw that inference from Borney's cut face. This was not the strongest defense for Borney, but neither was it his only defense. It was not ineffective assistance for Borney's lawyer to lump this

suggestion with others in the hope something might convince at least one juror. This explanation is rational and satisfactory.

Item Two—Woods "exploded" on Borney. Borney's counsel included this claim in opening statement, successfully won admission a photo of Borney's scarred face during the trial, and mentioned Borney's "slashed" face and his "scar" during closing argument. It was not ineffective assistance for Borney's lawyer to urge this inference to the jury. The theory was too weak to support self-defense and provocation jury instructions, but it was rational for counsel to mention it as a possibility. A rational and common defense is to stress the weaknesses of the prosecutor's case and to explain the range of mitigating and exculpating possibilities that could create reasonable doubt.

One defense theme at trial was that the record left many questions about what really happened, and this uncertainty equaled reasonable doubt, which was a reason to acquit Borney. One major weakness in the prosecution's case was Ammons's unreliability: a confessed alcoholic schizophrenic who had made many inconsistent statements. Borney's trial lawyer offered the "Woods exploded on Borney and slashed his face" suggestion as one possible scenario. Counsel's specific choice of words is within the wide and fair discretion of a trial lawyer locked in combat. This general approach is a common and rational defense option. Sometimes it works. It was not ineffective assistance in this case.

Item Three—Treating the opening as though it never happened. Borney is incorrect to claim his trial lawyer switched gears and treated the opening statement as though it never happened. The opening statement was long and contained many themes and ideas. The closing argument was generally

consistent with the opening statement. There was no wholesale abandonment, no u-turn. The work was professional in quality. Defense counsel had to work with the hand he was dealt, which lacked high cards.

Item Four—Failing to request self-defense and voluntary manslaughter instructions. There was no basis for these instructions. Whether counsel did or did not request them, there can be no error in failing to request what is futile to seek.

IV

We agree with both parties and direct the trial court to award Borney 1,850 actual days of presentence custody credit and to amend the abstract of judgment accordingly.

V

The abstract of judgment and the clerk's January 26, 2018 sentencing minute order contain errors as to count 2 and must be corrected.

First, both documents must be corrected to state the three-year sentence for count 2 is the "high" term, rather than the "low" term. (Pen. Code, § 213, subd. (b).)

Second, the January 26, 2018 minute order contains an erroneous second set of minutes for the sentence on count 2. That set of minutes, which starts with the sentence "As to count 2, the defendant is sentenced to a total of 4 years in any state prison," and ends with the sentence "An additional 1 year is stayed pursuant to Penal Code section 654," must be deleted. The abstract of judgment as to count 2 must be corrected to reflect only one enhancement under Penal Code section 12022: the enhancement that was stayed with the rest of the sentence on count 2.

Third, the abstract of judgment as to count 2 must be corrected to show Borney was convicted by a jury rather than a guilty plea.

DISPOSITION

We direct the trial court to award Borney 1,850 days of presentence custody credit and amend the abstract of judgment accordingly. We also direct the trial court to amend the January 26, 2018 sentencing minute order and abstract of judgment to reflect the correct sentence imposed on count 2. The trial court must forward the modified abstract of judgment to the Department of Corrections and Rehabilitation.

The judgment is otherwise affirmed.

WILEY, J.

WE CONCUR:

GRIMES, Acting P. J.

ADAMS, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.